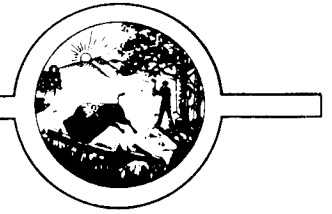


Indiana Department of Education



Dr. Suellen Reed, Superintendent
Room 229, State House • Indianapolis, IN 46204-2798 • 317/232-6665

1-12-94

RECENT DECISIONS

Recent Decisions is a periodic communication from the Legal Section of the Indiana Department of Education to the Indiana State Board of Education, the Indiana Board of Special Education Appeals, Administrative Law Judges/Independent Hearing Officers, Mediators and other constituencies involved in or interested in publicly funded education. Full texts of opinions cited or documents referenced herein may be obtained by contacting Kevin C. McDowell at (317) 232-6676 or by writing to the address listed above.

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School Construction: Right to Administrative Review

The Indiana State Board of Education (ISBOE) entertained three significant school construction cases which required determinations as to (1) who has standing to seek review from the Indiana State Board of Education regarding decisions by the Indiana Department of Education (IDOE); and (2) if review is available to individual citizens, are there any limitations on the State Board's review.

At issue were the applicability of the following statutes: I.C. 20-1-1-6(a)(2), establishing the ISBOE's rule-making authority for new school sites and facilities, or modifications and additions requiring the services of an architect, but reserving approval of projects to IDOE; I.C. 20-1-1-

6.1, adding further conditions for the ISBOE to consider when adopting rules; I.C. 20-4-1-34, requiring ISBOE to enforce rules establishing procedures and standards for school construction and exempting a "community school corporation" from receiving approval from ISBOE; 511 IAC 2-1-1, which grants ISBOE review of all decisions by IDOE under the "school construction principles" rule; and 511 IAC 2-2-1, the procedures and standards for approval of school construction and remodeling projects.¹

In Holland School Committee, Cause No. 9401001 (ISBOE 1994; Risa A. Regnier, Esq., ALJ), the State Board granted Motions to Dismiss filed by the school corporation and IDOE, finding that 511 IAC 2-1-1 applies only to "school construction principles" and not 511 IAC 2-2 (standards and procedures). As a consequence, no one other than the governing body has the right to challenge IDOE action regarding school construction where, as here, the school corporation is a "community school corporation" under I.C. 20-4-1-3. Since ISBOE had not been granted by statute the authority to review IDOE's procedures in approving the building project, ISBOE's authority was limited to the extent that it could ensure IDOE followed ISBOE rules (procedural compliance). The citizen group did not allege IDOE failed to follow these procedures; hence, the jurisdiction of the ISBOE had not been invoked. The State Board noted that the citizen group had procedural recourse to the remonstrance provisions of I.C. 21-5-11-7 or 21-5-12-7 (State Board of Tax Commissioners) or under I.C. 34-4-17 (public lawsuits, which include school construction projects). (Decision is available as RD Doc. #10.)

In Clay Community Schools, Cause No. 9312025 (ISBOE 1994; John T. Roy, Esq., ALJ), the citizen group challenged IDOE's approval of a middle school construction project. Unlike Holland School Committee, the citizen group did allege that IDOE failed to follow the State Board's rules. While the citizen group had raised the issue of procedural compliance, the school corporation and IDOE challenged their standing to invoke jurisdiction of the ISBOE. The citizen group's interest is derivative from the governing body of the school corporation. It is the governing body which represents the community and not a dissenting minority. The citizen

¹HEA 1598 (1995) amends I.C. 20-1-1-6, effective July 1, 1995, removing the State Board's rule-making authority in school construction matters. I.C. 20-1-1-6.4 is added, requiring the State Board to develop guidelines for site selection and school construction. A school corporation must consider the ISBOE guidelines, explain in a public document any material differences between the school's plans and specifications and the guidelines, hold a public hearing, and file with IDOE a copy of the public document and any revisions. I.C. 20-5-32-5 is amended to remove the requirements that plans and specifications be submitted to IDOE for approval. I.C. 21-5-11-4 is amended to indicate the ISBOE is not authorized to approve or disapprove plans and specifications of a public holding corporation "for any reason other than to comply with applicable minimum health and safety standards." The State Board is required to certify that final plans and specifications comply with other state and federal statutes. This certification would include civil rights requirements. It is not clear what legal consequences there will be should the ISBOE decline to certify the plans and specifications of a public holding corporation. I.C. 20-1-1-6.1 and I.C. 20-4-1-34 were unaffected.

group had no "direct or substantial" interest that was demonstrably injured in any fashion. As noted in Holland, *supra*, citizens have other administrative and judicial recourse but do not have standing to invoke ISBOE jurisdiction (Attachment A). Petitioners sought judicial review. However, the Court on March 20, 1995, granted the school corporation's and IDOE's Motions to Dismiss. No further appeal was made.

Transfer Tuition: Home-Schooled Students

The Indiana State Board of Education recently revisited the issue of nonpublic school students, access to vocational programs, and transfer tuition. Previously, the State Board found discriminatory a local school board policy which prohibited "dual enrollment" by students with legal settlement who attended both a private and a public school. In In the Matter of M.D. and Penn-Harris-Madison School Corp., Cause No. 8909024 (ISBOE 1990, Risa A. Regnier, Esq., ALJ), the student was enrolled in a private school but sought enrollment at the public school or the Career Center in order to take commercial art. The school refused enrollment and denied the request for transfer tuition to the Career Center. Other public school corporations participating in the Career Center were sending private school students. The State Board found that the school corporation cannot deny enrollment to a private school student who has legal settlement and is otherwise entitled to attend the public school. (The decision is available as RD Doc. #11.)

However, in In the Matter of C.G. and Blue River Valley Schools, Cause No. 9410025 (ISBOE 1995, John T. Roy, Esq., ALJ), the student was a "home school" student who did not seek to enroll in his school corporation of legal settlement prior to attending the vocational education cooperative. Transfer tuition requires that the "student" be enrolled in a public school. See I.C. 20-8.1-1-3.5. The Administrative Law Judge found that the transfer tuition statutes would not apply because C.G. was not a "student" and had not sought to become a "student." As a consequence, the school corporation was not responsible for the payment of transfer tuition.

There were also several jurisdictional questions, the most interesting involving a construction of I.C. 20-8.1-3-17.3(b) which, in isolation, seems to grant to a school corporation the discretion to determine whether a student from a nonaccredited, nonpublic school, such as a "Home School," can enroll in a public school program. The ALJ noted that such unfettered discretion is contrary to other statutory provisions, including the nondiscrimination statutes, as well as the Indiana Constitution, Article 8, Sec. 1.

The State Board noted at its February 2, 1995 meeting that this decision and its predecessor apply to academic and vocational programs and should not be construed as involving interscholastic athletic participation or other similar extracurricular activities. See Attachment B for the written decision.

Attorney Fees: Transfer Tuition

I.C. 20-8.1-6.1-11(c) permits a school corporation which prevails at a transfer tuition hearing to compel payment of transfer tuition to recover "reasonable attorney fees." The Indiana State

Board addressed this issue recently in a bifurcated hearing. In In the Matter of Southwest Allen County Schools v. Board of Commissioners of Delaware County, Cause No. 9305008 (ISBOE 1993; ISBOE, 1994; Risa A. Regnier, Esq., ALJ), the State Board first determined that the school corporation was owed over \$11,000 by the county for educational services provided to a student with disabilities placed in a group home within the school district. The student originally lived in Elkhart County prior to his placement in the group home. After his placement, his mother moved to Delaware County to live with her grandparents. The group home placement was obtained through Integrated Field Services of the Family and Social Services Administration (FSSA).

Delaware County challenged its responsibility to pay transfer tuition based on (1) lack of legal settlement; or in the alternative, (2) the State should pay because FSSA obtained the placement. The State Board noted that the State is responsible for payment where a student is placed in an institution *operated by* the Division of Disability, Aging, and Rehabilitative Services (DARS) or the Division of Mental Health (DMH). While DARS and DMH are a part of FSSA, the group home is not "operated by" either Division but is a private, not-for-profit agency which contracts with FSSA. The student is not a ward of the state. Under a straightforward application of I.C. 20-8.1-6.1-1, his legal settlement would be Delaware County as that is where his mother resides.

In the second hearing, the State Board considered the school corporation's attorney fee request. The school corporation's attorney requested over \$9,000 based on 123 hours of work at \$75 an hour. The attorney justified the billing as necessary due to the unusual and complex facts and issues involved; the nature of the proceeding; and the high degree of experience, skill and expertise the firm possessed in such matters. The county asserted that if this were such a complex matter, it should not be penalized. The State Board did not question the reasonableness of the hourly rate of \$75, but did question the reasonableness of some of the billing entries, notably the taking of a deposition and the charging for a different, unrelated hearing not involving Delaware County. The State Board did not agree that this hearing involved unusual or complex issues. The State Board also noted that if one does possess a high degree of skill and expertise in this field, one does not need to invest this kind of time and effort. Accordingly, the attorney fee request was reduced by 75 percent to \$2306.25. (Available as RD Doc. #12.)

Sanctions In Administrative Hearings

In Article 7 Hearing No. 729-94, 21 IDELR 423, (James Roth, Esq., IHO) the Indiana Board of Special Education Appeals (IBSEA) addressed a question of first impression: May an Independent Hearing Officer (IHO) impose sanctions upon a party under the hearing procedures at 511 IAC 7-15-5?

The student attended a private school, but had attended the public school. The student claimed that the public school failed to provide a free appropriate public education, had engaged in retaliation, and had acted in bad faith. The school requested copies of the student's educational records from the private school and also requested the results of certain privately obtained neurological, psychological or psychoeducational assessments of the student. The student

objected to the request, alleging the educational records were not in the student's control or custody and that there were no assessment results. The IHO overruled the objections and ordered the student to comply. The student did not comply. The school moved the IHO to compel discovery and to enter sanctions, alleging oral misrepresentations, bad faith, and false statement by the student's attorney. The IHO again ordered compliance with the school's discovery request. The student did not timely comply, but did provide the requested educational records shortly before the hearing. The IHO did not levy sanctions at this time. Testimony at the hearing from private school personnel indicated that the student did have and has had access to the student's educational records. The attendance records indicated the student had been hospitalized for a two-week period during which time a psychological assessment was conducted. The psychologist testified at the hearing that he visited the student at the hospital. The IHO found that the student's attorney had engaged in "sham objections" and had engaged in egregious behavior. The repeated failures to comply with discovery orders was "willful and without an arguably sustainable legal basis, caused delay in discovery of information legitimately available to the school, and attempted to hide a document that would have led to information of the child's recent hospitalization." The IHO entered the following order:

Petitioners shall pay the LEA the sum of five hundred dollars (\$500.00) within 45 days of this order.

The Indiana Board of Special Education Appeals noted that hearings under 511 IAC 7-15-5 are conducted pursuant to the Administrative Orders and Procedures Act (AOPA), I.C. 4-21.5-3. See 511 IAC 7-15-5(x). The AOPA permits the imposition of sanctions:

4-21.5-3-8 Sanctions; temporary orders

Sec. 8. (a) An agency may issue a sanction or terminate a legal right, duty, privilege, immunity, or other legal interest not described by section 4, 5, or 6 of this chapter only after conducting a proceeding under this chapter. However, this subsection does not preclude an agency from issuing under I.C. 4-21.5-4, an emergency or other temporary order concerning the subject of the proceeding.

(b) When an agency seeks to issue an order that is described by subsection (a), the agency shall serve a complaint upon:

- (1) each person to whom any resulting order will be specifically directed; and
- (2) any other person required by law to be notified.

A person notified under this subsection is not a party to the proceeding unless the person is a person against whom any resulting order will be specifically directed or the person is designated by the agency as a party in the record of the proceeding.

(c) The complaint required by subsection (b) must include the following:

- (1) A short, plain statement showing that the pleader is entitled to an order.
- (2) A demand for the order that the pleader seeks.

The Board's written opinion summed up its reasoning:

The question of sanctions is one of first impression for this Board under these regulations. In Indiana, discretionary decisions of administrative law judges, including independent hearing officers appointed under 511 IAC 7-15-5, will not be reversed absent a showing that such decisions were arbitrary and capricious, an abuse of discretion, or otherwise not in accordance with the law. This would include any sanction imposed by an independent hearing officer. City of Greenwood v. Dowler, 492 N.E.2d 1081, 1084 (Ind. App. 1986), reh. den.

The IHO has authority to "rule on any other matters with respect to the conduct of a due process hearing..." 511 IAC 7-15-5(k)(4). Such due process proceedings are conducted pursuant to I.C. 4-21.5-3, the Administrative Orders and Procedures Act (AOPA). 511 IAC 7-15-5(x).

The AOPA at I.C. 4-21.5-3-8 specifically allows the imposition of sanctions. The IHO did not enter sanctions until the conclusion of the hearing, providing sufficient notice to the parties that sanctions had been demanded with sufficient facts pleaded or in the record to support this request by Respondent-Appellee. The amount of the sanctions is also reasonably based upon an ascertainable standard.

However, the IHO's order lacks clarity with respect to whom the sanction is to be imposed by referring to "petitioners" as the responsible party. At various parts of his written decision, the IHO describes the Petitioner-Appellant, her mother, and her stepfather (also her legal counsel) as "petitioner."

In an analogous situation, the U.S. 4th Circuit Court of Appeals upheld sanctions against a student's father for repeated disobedience of court orders (coincidentally, for \$500.00 as well), but also noted that the student's interest was separate and apart from his father's interests, and his father's actions should not act as a forfeit upon the student. Mylo v. Board of Education of Baltimore County, 18 IDELR 346 (4th Cir. 1991).

In this circumstance, whatever Petitioner-Appellant's stepfather's status may have been in this hearing, he was acting as an attorney. As such, he is responsible for the conduct of himself and others acting on his behalf. Accordingly, the IHO's order will be amended to reflect that only Petitioner-Appellant's attorney is responsible for payment of the \$500.00 sanction.

The Board found that the requirements of I.C. 4-21.5-3-8 were met for imposing sanctions: (1) there was adequate notice that sanctions had been requested, (2) the basis for the request was clearly articulated, and (3) the amount of the sanctions imposed was based upon an ascertainable, reasonable standard (the amount of attorney fees expended by the school in pursuing

enforcement of the discovery order). The Board, however, directed that the sanctions be imposed on the student's attorney. The Board declined in this situation to impute the actions of the attorney to the student, even though in the absence of fraud a client is bound by the actions of his attorney even when the attorney is guilty of gross negligence. Mirka v. Fairfield of America, Inc., 627 N.E.2d 449, 450 (Ind. App. 1994).

It is noteworthy that the imposition of sanctions followed repeated failures to comply with IHO discovery orders and involved misrepresentation and other egregious behavior. This would be an extraordinary exercise of discretion by an IHO or any other ALJ.

For other cases involving sanctions, see:

1. Edwards v. Fremont Public School, 21 IDELR 903 (D.Neb. 1994). The court sanctioned the Assistant Attorney General for failure to make "reasonable inquiry" regarding the requirements of the Individuals with Disabilities Education Act (IDEA) before asserting groundless bases for moving to dismiss a claim. The state defendants had moved for dismissal based upon 11th Amendment immunity, but such immunity has been abrogated by 20 U.S.C. Sec. 1403. Also see Hansboro v. Northwood Nursing Home, Inc., 151 FRD. 95 (N.D. Ind. 1993).
2. Giangrasso v. Kittatiny Regional High Sch. Bd. of Ed., 22 IDELR 419 (D. N.J. 1994). The court levied a \$100,000 sanction against the student's attorney for filing a frivolous IDEA lawsuit stemming from a one-day suspension. The attorney had a history of filing frivolous lawsuits against the school and had engaged in a pattern of egregious behavior, including failure to comply with discovery orders and failure to provide copies of documents to opposing counsel.
3. Harrison v. McNeese State University, 635 So.2d 318 (La. App. 1994). *Pro se* litigant was sanctioned for nearly \$7,000 for initiating litigation for purpose of harassment and not for exercising a legal right. Also see Palesky v. Maine Sch. Admin. Dist. No. 75, 640 A.2d 202 (Me. 1994) as well as Posner v. Central Synagogue, 609 N.Y.S.2d 195 (N.Y. App.1994).

Newly Discovered Evidence Hearing Rights on Appeal

In Article 7 Hearing No. 777-94, the Indiana Board of Special Education Appeals revisited the standards for "newly discovered evidence" and the applicability of hearing rights on administrative appeal. The student had been represented at the hearing by an attorney. However, a professional advocate represented the student on appeal. The advocate sought to introduce a substantial amount of new evidence. The Board advised the parties of the statutory standard for "newly discovered evidence" under the AOPA and judicial constructions. Had the Board found that the proffered evidence met the standards for "newly discovered evidence," then the hearing rights under 511 IAC 7-15-5 would have to be provided to the parties. See 34 CFR

Sec. 300.510(b)(3) and I.C. 4-21.5-3-28(e)(3). This would include the timeline for exchange of witness lists and documents (the "five-day" rule), which would have preempted the appeal until the hearing phase was completed. Under special education law, the administrative appeal/review entity cannot remand a dispute to the original IHO/ALJ. Dellmuth v. Muth, 109 S.Ct. 2397 (1989). The Board did not find that the proffered evidence met the "newly discovered" standards and, accordingly, excluded the documents. The appeal was then conducted. The following is the Board's discussion regarding newly discovered evidence and hearing rights on appeal (Also see Recent Decisions 6-7:87 and Recent Decisions 1-5:90).

The following standards apply to newly discovered evidence:

The evidence must be:

1. Material and relevant;
2. Not merely cumulative;
3. Not merely impeaching;
4. Not privileged or incompetent;
5. Shown not to be discoverable before the original hearing by the exercise of due diligence;
6. Credible;
7. Readily produced at the hearing (on appeal, asking the Board to reopen the hearing, see below); and
8. Reasonably and likely to change the outcome of the hearing.

See Mid -State Aircraft Engines v. Mize Co., 467 N.E.2d 1242, 1246 (Ind. App. 1984) and Peacock v. Indianapolis Public Schools, 721 F.2d 210, 213-4 (7th Cir. 1983).

Under the Administrative Orders and Procedures Act (AOPA), 4-21.5-3 *et seq.*, the party seeking a rehearing of a final order must demonstrate that:

1. The party is not in default under the AOPA;
2. Newly discovered material evidence exists; and
3. The evidence could not, by due diligence, have been discovered and produced at the hearing in the proceeding. I.C. 4-21.5-3-31(c)(1)-(3).

Under the Individuals with Disabilities Education Act (IDEA) and its counterpart at 511 IAC 7-3 through 7-16 inclusive ("Article 7"), the Board cannot remand the matter to the Independent Hearing Officer to receive and rule on evidence alleged to be newly discovered. See Dellmuth v. Muth, 109 S. Ct. 2397 (1989). If the Board decides to receive additional evidence, the Board must afford the parties the due process rights available under 511 IAC 7-15-5. See 34 CFR Sec. 300.510(b)(3) and I.C. 4-21.5-3-28(e)(3). The Board will have to entertain argument on whether the proffered documents are newly discovered evidence and

rule on same before oral argument can or should ensue. The party offering the documents as newly discovered evidence has the burden of proof regarding whether or not the documents are "newly discovered" under statute and applicable judicial constructions (noted above).

For other recent cases addressing "newly discovered evidence," see:

1. State Ex Rel. Huppert v. Paschke, 637 N.E.2d 150 (Ind. App. 1994).
2. Freels v. Winston, 579 N.E.2d 132 (Ind. App. 1991).

Graduation and Free Appropriate Public Education

Interlocutory Appeals Not Available

Due Process Can Be Reviewed Independently of Substantive Issues

In Evans v. Tuttle, 613 N.E.2d 854 (Ind. App. 1993), the Indiana Court of Appeals permanently enjoined the State of Indiana from restricting "disabled children aged 18, 19, 20 or 21 who desire to continue their education and who have not yet completed their high school education, from receiving a free appropriate education." This resulted in an amendment to 511 IAC 7-4-1 effective May 26, 1995. Two important administrative decisions have indicated that receipt of a high school diploma will indicate completion of one's high school education and extinguish one's entitlement to a free appropriate public education (FAPE).

In Article 7 Hearing No. 750-93, 21 IDELR 776 (Cynthia Stanley, Esq., IHO), the Indiana Board of Special Education Appeals reviewed a hearing replete with interesting issues. The school requested the initial hearing in order to implement the student's program. The parent subsequently requested a hearing to challenge the proposed placement, the student's grade point average, the number of credits he should have earned, the status of two incompletes, the appropriateness of past program modifications, the appropriateness of the student's Individualized Transition Plan (ITP), involvement of the student's teachers in all staffings regarding the student, the eligibility of the student to participate in graduation ceremonies and whether the school had discriminated against the student. Because the graduation ceremony was imminent, the parties agreed to a hearing on that issue alone. The IHO rendered a written interim decision finding against the student, noting that his failure to earn sufficient credits in order to graduate was the result of the student's and the parent's interference with the school's good faith attempts to provide him a FAPE. The student was capable of earning sufficient credits in order to receive a diploma and was not entitled to attend the ceremony as a student who "completed a program" as that concept is employed at 511 IAC 7-13-3(d). The parent attempted an interlocutory appeal of the interim decision, which the Indiana Board of Special Education Appeals refused to consider. The Board noted that it can review only final orders, not interim orders. See also Recent Decisions 1-12:92.

The remaining issues were eventually resolved by the parties. The student completed his coursework and graduated, receiving a diploma. The IHO dismissed the hearing. The parent

again appealed, challenging the findings and conclusion of the IHO in her interim order. The Board, noting Mars (PA) Area School District, 21 IDELR 188 (OCR 1994), found all issues relative to the hearing as moot because the student had completed his coursework for graduation and accepted his diploma. However, the parent's appeal also alleged that the due process procedures were inconsistent with State and Federal law and denied the parent her hearing rights. The Board noted that although the substantive issues were moot, State and Federal law require that due process procedures be reviewed. See 511 IAC 7-15-6(k) and 34 CFR Sec. 300.510(b)(2). A party then can initiate administrative review regarding due process procedures alone. The Board reviewed the procedures and found that all parties received an impartial hearing and were afforded the due process rights contemplated by State and Federal law. See Attachment C.

In Article 7 Hearing No. 767-94 (Dennis Owens, Esq., IHO), it was also determined that graduation and receipt of a diploma extinguishes a school's obligation to continue to provide educational services. The student had been involved in a serious automobile accident which resulted in hospitalization for nearly two years. She was initially educated through homebound instruction upon leaving the hospital and was gradually reintegrated into the school environment. Eventually the student earned 43.5 credits, which exceeded the school's requirements for a high school diploma. The parents requested additional educational services beyond graduation. After consideration of the request, the school declined. The IHO found the school had discharged its responsibility and had no further obligation to provide services. No administrative appeal was sought.

Fitness To Teach

The Indiana Professional Standards Board (IPSB) has established seven factors to consider in determining whether one has displayed adequate "fitness" to teach in Indiana. The seven factors appear at 515 IAC 1-2-18(h) and involve the following:

1. The likelihood the conduct or offense adversely affected, or would affect, students or fellow teachers and the degree of adversity anticipated
2. The proximity or remoteness in time of the conduct or offense.
3. The type of teaching credential held or sought by the individual.
4. Extenuating or aggravating circumstances surrounding the conduct or offense.
5. The likelihood of recurrence of the conduct or offense.
6. The extent to which a decision not to issue the license would have a chilling effect on the individual's constitutional rights or the rights of other teachers.

7. Evidence of rehabilitation, such a participation in counseling, self-help support groups, community service, gainful employment subsequent to the conduct or offense, and family and community support.

These seven factors are included within three general areas of inquiry when attempting to decide whether one displays the requisite fitness to be a teacher in the State of Indiana: (1) academic qualifications, (2) character, and (3) reputation.

These factors were considered in In the Matter of C.R.C., Cause No. 940419067 (IPSB 1994; Kevin C. McDowell, Esq. and J. David Young, ALJs).²

The applicant had previously falsified a college transcript and forged an Indiana teacher's license in order to obtain a teaching job at an Indiana school corporation. The school eventually learned of C.R.C.'s activities and confronted him. He resigned and reimbursed the school system. No criminal charges were filed. He also was suspended from the college he attended. C.R.C. enrolled at a private college, completed his college education (including student teaching), and was, by all accounts, suitable academically to teach. However, the two additional prongs of inquiry--character and reputation--precluded the issuance of an Indiana teacher's license. The IPSB noted the distinctions between "character" (attributes one actually possesses) and "reputation" (attributes people believe one possesses). The IPSB noted that the recommendations supporting his application came from people whom he had not informed of his past indiscretions (except for one). This indicated a character flaw which, in turn, affected the testimonials as to his reputation. The IPSB denied his application for an initial Indiana standard teacher's license. See Attachment D.

Also see Patterson v. Superintendent of Public Instruction, 887 P.2d 411, 415 (Wash. App. 1994), where the teacher's falsification and omission of information from an employment application and tampering with his personnel file supported suspension of the teacher's license. Such conduct was considered "unprofessional" and evinced a "lack of good moral character or personal fitness."

Retroactive Application of Regulations

The Indiana Professional Standards Board (IPSB) amended 515 IAC 1-2-18(b)(3) effective January 15, 1994, to permit revocation of a teacher license for misdemeanor convictions as well as felonies. Prior to that date, revocation could be based only on felony convictions directly related to a person's teaching duties and involving crimes of moral turpitude. The amended rule contained no language indicating retroactive application. The IPSB addressed retroactivity in In the Matter of D.D., Cause No. 940510071 (IPSB 1994, Risa A. Regnier, Esq. and Joseph Weaver, ALJs). D.D., a licensed teacher, pled guilty to obstruction of justice, a Class D felony.

²The IPSB uses two ALJs (one a member of the Board) to hear fitness, license reinstatement and license revocation matters. Three ALJs (two who are members) hear all matters requesting exceptions to IPSB rules.

The judge entered the conviction as a Class A misdemeanor. This occurred two months prior to the effective date of the amended IPSB regulation. D.D. was aware in November 1993 that if he were convicted of a misdemeanor, he would retain his teacher license. D.D. was unaware the regulation was being amended. The IPSB determined that the amended regulation would not be applied retroactively (See Conclusion of Law #6, Attachment E.)

The IPSB's decision in D.D. is in concert with subsequent Federal and State decisions. In Landgraf v. USI Film Products, ___ U.S. ___, 114 S. Ct. 1483 (1994), the U.S. Supreme Court held that as a matter of federal procedural law, statutory creation of or changes in procedural law are subject to retroactive application. However, a provision attaching new legal consequences to events completed before its enactment thus impairing rights a party possessed when he acted, increasing a party's liability for past conduct, or imposing new duties with respect to transactions already completed may not be applied retroactively. The Indiana Supreme Court has adopted the Landgraf decision for state procedural matters. See Kimberlin v. DeLong, 637 N.E.2d 121, 125 (Ind. 1994).

Recent Decisions Index

Attachment F is an index to Recent Decisions since its inception in 1986. For reprints of any referenced article, please call me at the number below or write.

Also available on request:

1. Holland School Committee School Construction (RD Doc. #10).
2. M.D., In the Matter of Transfer Tuition and Private School Students (RD Doc. #11).
3. Attorney Fees: Transfer Tuition/Southwest Allen County Schools v. Delaware County (RD Doc. #12)

June 16, 1995
Date

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1-12:94

KCM/rjr



Indiana State Board of Education

BEFORE THE INDIANA STATE BOARD OF EDUCATION

CAUSE NO. 9312025)
IN THE MATTER OF:)
)
Clay Community Schools - Appeal)
by Chester Bell, Patty J. Baker,)
et al., Petitioners, From the)
Approval of a Middle School)
Construction Project.)

MEMORANDUM AND ORDER

I. INTRODUCTION

This matter comes before the Indiana State Board of Education (State Board) on an appeal of the Indiana Department of Education's (Department) approval of a middle school construction project for the Clay Community Schools (School). On December 7, 1993, the School filed an application with the Department's Division of School Facility Planning for project approval pursuant to 511 IAC 2-2-1(B). On December 14, 1993, the Director of the Division of School Facility Planning recommended to the Superintendent of Public Instruction that the project be approved. The Superintendent, as the Director of the Department of Education, Ind. Code § 20-1-1.1-3, approved the School's request on the same day.

On December 27, 1993, Petitioners, a group of resident taxpayers of the School Corporation, through their attorney, Nelson Grills, filed a petition with the Indiana State Board of Education appealing the Department's decision. Petitioners alleged several reasons why the decision of the Department should be overturned. These reasons are: (1) the School has failed to "strive for true economy in school construction" as required by 511 IAC 2-1-1; (2) the School proposed the construction project without providing the local community the opportunity to study the situation as required by 511 IAC 2-2-1; (3) the School failed to provide in its feasibility study the "potential for meeting the educational needs" of the students pursuant to 511 IAC 2-2-1(B)(2); (4) the School failed to conduct a feasibility study that determines the "future education program needs" pursuant to 511 IAC 2-2-1(B)(1)(e); and (5) the School has failed to develop educational programs it wishes to establish pursuant to 511 IAC 2-2-1(B)(2).¹

¹Petitioners also present a sixth reason for overturning the Department's decision. The hearing officer, however, is unable to determine exactly what the allegation is. No evidence was

Attachment

A
Attachment A 1 of 10
(10 pp.)

The State Board of Education appointed a hearing officer on January 25, 1994, and a hearing date was set for March 1, 1994. On February 3, 1994, attorney Jeffrey A. Boyll filed his appearance on behalf of the School as well as a motion to dismiss the petition alleging Petitioners lack standing to prosecute this appeal. This motion was joined by the Department on February 14, 1994, when the Department filed its own motion to dismiss based on standing.

On February 25, 1994, Petitioners filed a motion to continue the hearing. This motion was granted on February 28, 1994, and a new hearing date was set for April 8, 1994. Due to a conflict of scheduling with the representative of the Department, the Department moved for a continuance on March 4, 1994. This motion was granted the same day. This time, however, the hearing was continued until such time as the motions to dismiss were addressed. The Department was ordered to produce to the hearing officer a copy of the construction approval forms and the written approval notification. The Department complied with his order on March 8, 1994.

Petitioners filed a brief in opposition to the motions to dismiss on March 10, 1994. The School filed its reply brief on March 16, 1994, to which Petitioners filed a response on March 25, 1994.

On March 29, 1994, the hearing officer, *sua sponte*, ordered the parties to brief the issue of the applicability of Ind. Code § 20-4-1-34 and its effect on standing. This prompted the filing of an appearance for the Department by Kevin C. McDowell on April 14, 1994. On April 15, 1994, both Petitioners and the School filed their respective briefs as ordered by the hearing officer. The Department filed a second motion to dismiss on April 16, 1994, addressing Ind. Code § 20-4-1-34 as ordered by the hearing officer, and, in the alternative, alleging that if the Board has jurisdiction in the matter, jurisdiction only extends to examine whether the Department is in procedural compliance with the Board's rules.

On April 22, 1994, the hearing officer set the matter for a hearing on all issues, including the motions to dismiss as well as the merits of the petition, for May 26, 1994. The School filed a motion to continue the hearing date on April 29, 1994. On May 2, 1994, the hearing officer granted the motion to continue and reset the hearing for May 27, 1994. A hearing was in fact held on this date concerning all issues. At the hearing, eleven exhibits were admitted. These exhibits are:

1. Project Application from Clay Community Schools.

presented at the hearing to enlighten the parties as to precisely what it means. To the extent that it alleges that the patrons of the school corporation did not have adequate knowledge of the middle school concept, this allegation will be considered with issue number 2. Petitioners do not cite any rule violation for this allegation also. As such, it does not state a claim for which relief may be granted by the Board. See discussion on jurisdiction, *infra*.

2. Indiana State University Study of School Educational Program Facilities dated June, 1992. (June, 1992 Feasibility Study)
3. Indiana State University Study of Community and School Demographics and School Corporation Fiscal Ability to Finance Construction dated December, 1992. (December, 1992 Feasibility Study)
4. Publisher's Claim Affidavits.
5. Correspondences from Superintendent Thomas W. Rohr to Dennie C. Skeens dated November 23, 1993, re: Request for Review of ISU Feasibility Study.
6. Correspondence from Dennie C. Skeens to Thomas W. Rohr dated November 29, 1993, re: Review of ISU feasibility Study.
7. Memorandum from Dan Roland to Dennie C. Skeens dated December 13, 1993, re: School Corporation's Application for Capital Projects Fund/Common School Fund.
8. Warranty Deed from Elinor B. McQueen to Clay Community Schools dated August 10, 1992.
9. Correspondence from Dennie C. Skeens to Thomas W. Rohr dated December 14, 1993, re: Project Application Approval.
10. Memorandum from Jeffery Zaring to Indiana State Board of Education September 24, 1993, re: School Facility Rules with Attached Proposed Rule Changes.
11. Minutes of Meeting of Board of Trustees of Clay Community Schools for December 6, 1988, Meeting.

In lieu of closing arguments, it was agreed that the parties would file post-hearing briefs. The Department and School filed their respective briefs on June 8, 1994, while Petitioners filed their brief on June 9, 1994.² The case is therefore ripe for adjudication.

²It was agreed at the hearing that the post-hearing briefs would be due on June 8, 1994. Petitioners filed a motion to continue along with their brief on June 9, 1994, due to both physical and technical difficulties on behalf of their attorney. The hearing officer will treat this a motion to file instanter and hereby grants same.

II. JURISDICTION

The first issue in any adjudication is that of jurisdiction. "An administrative body generally possesses authority to determine initially whether a matter presented to it falls within the jurisdiction conveyed to that body." Guinn v. Light (1990), Ind., 558 N.E.2d 821, 823. Jurisdiction is grounded upon constitutional or statutory authority and its existence is a judicial question. State v. Review Brd. of Indiana Employment Sec. Div. (1951), 230 Ind. 1, 14, 101 N.E.2d 60, 66. Jurisdiction involves three elements, jurisdiction of the subject matter, jurisdiction of the person, and jurisdiction of the particular case. State ex rel. Dean v. Tipton Circuit Court (1962), 242 Ind. 643, ___, 181 N.E.2d 230, 235; Harp v. Ind. Dept. of Highways (1992), Ind. App., 585 N.E.2d 652, 659. In this case, none of the parties is challenging jurisdiction of the person. Rather it is jurisdiction of the subject matter and the particular case that is at issue.

In the Department's second motion to dismiss, it raises the issue of subject matter jurisdiction. According to the Department, the State Board of Education only has jurisdiction to ensure that its promulgated rules are followed by the Department of Education. Jurisdiction, it is argued by the Department, only extends so far as to inquire whether the Department followed the rules enacted by the Board. This point was conceded by the Petitioners at the hearing. See also In re Holland School Committee, cause no. 9401001 (S.B.O.E.) July, 1994. This does not decide the case, however, as this is precisely what Petitioners have done.

The allegations raised by Petitioners specifically challenge the Department's action with respect to the provisions of the building project rules found in 511 IAC 2-1-1, *et seq.* Thus, though the Department's legal reasoning is correct, its second motion to dismiss must be denied as Petitioners have in fact alleged the specific rule violations necessary to give the State Board of Education subject matter jurisdiction. This, however, does not end the discussion on jurisdiction for there must be jurisdiction in all three elements of the test.

This leads to the issue of jurisdiction of the particular case. Jurisdiction of the particular case encompasses the element of standing. If a party is without standing to prosecute a particular cause, there is no jurisdiction to adjudicate the claim. Indiana Alcoholic Beverage Comm'n v. McShane (1976), Ind. App., 354 N.E.2d 259, 267.

Standing is a prudential limitation on the ability of individuals to seek redress through adjudication. Cablevision of Chicago v. Colby Cable Corp. (1981), Ind. App., 417 N.E.2d 348, 352.

Generally we yield to the political process and deny standing in those instances where a plaintiff alleges no special injury different in kind from that which is suffered by the community in general.⁶ A well established exception to this rule is that a taxpayer may maintain an action when the injury complained of is the unlawful collection or expenditure of public funds. State ex rel. Haberkorn v. DeKalb Circuit Court (1968), 251 Ind. 283, 241 N.E.2d 62; Zoercher v. Angler

(1930), 202 Ind. 214, 172 N.E. 186; Haywood Pub. Co. v. West et al. (1942), 110 Ind. App. 568, 39 N.E.2d 785. We also require the plaintiff to allege and show injury to a present interest, that is, to demonstrate his injury is more than a remote possibility. Department of Financial Institutions v. Johnson Chevrolet Co. (1950), 228 Ind. 397, 92 N.E.2d 714.

FN6 See, e.g. Indiana Alcoholic Beverage Commission v. McShane (1976), 170 Ind. App. 586, 354 N.E.2d 259.

Id. Thus in order to have standing to prosecute this appeal, Petitioners must establish a specialized injury different from that of the general public or that, as taxpayers, the injury is the unlawful collection or expenditure of public funds.

To analyze what, if any, interest Petitioners have in the Department's approval of a building project, it is important to understand just exactly what the approval means. The approval in question is the decision of the Department of Education that allows Clay Community Schools to draw up preliminary plans for a new middle school. It is not final approval of the project; that comes several steps down the line. See 511 IAC 2-2-1(C). It does not set tax rates. It does not impose any additional outlay of resources or mandate that the school expend funds if the School does not wish to do so. It merely allows the School Corporation to continue on a path it has already debated and chosen. The Board of Trustees is free to continue to debate both the benefits and drawbacks of pursuing the building project and to choose its course of action accordingly. The order merely states that, pursuant to the rules promulgated by the State Board of Education, the Department of Education approves of the course of action chosen by the Board of Trustees of Clay Community Schools. In essence, it is a license for the Clay Community Schools to continue down its pre-chosen path.

To this extent, there appears to be no injury at all. The School, as a legal entity, certainly has a stake in whether the Department approves its project application. Any interest the community would be derivative of the interest of the School. The elected representatives of the community discussed the issue and voted to submit a project application. The application was approved, thus there is no injury to the School and the will of the community, as reflected by its elected representatives, has suffered no injury by the action of the Department.

More evidence of how and why Petitioners lack a specific injury can be found in the notification provisions of the Administrative Orders and Procedures Act (AOPA). The applicable notice provision of the AOPA, found at Ind. Code § 4-21.5-3-5, requires notice of any order that does not impose a sanction or terminate a legal right, duty, privilege, immunity or other legal interest to the following individuals:

1. Each person to whom the order is directed.
2. Each person to whom the law requires notice be given.
3. Each competitor who has applied to the agency for a mutually exclusive license.

4. Each person who has provided the agency with a written request for notification of the order.
5. Each person who has a substantial and direct proprietary interest in the subject of the order.
6. Each person whose absence as a party in a proceeding concerning the order would deny another party complete relief.

The only vehicle Petitioners could claim entitles them to notice in this particular case is the "substantial and direct proprietary interest in the subject of the order."

As discussed supra, it is clear that Petitioners have no "direct or substantial interest" in this specific order. It may be argued that as taxpayers, they must ultimately foot the bill for the project. While this is no doubt true, it is not the type of direct and substantial interest contemplated in the statute. If such were the case, the Department of Education would be required, pursuant to Ind. Code § 4-21.5-3-5, to send notice to every taxpayer in the School Corporation. The interest is not "direct" either. Any additional tax rate would be determined at a later date when the lease is signed or bonds are issued. At such time, taxpayers have a specific remonstrance statute to challenge the action. See Ind. Code §§ 21-5-11-7 and 21-5-12-7.

The state of taxpayer lawsuits was well set forth in Montagano v. City of Elkhart (1971), Ind. App., 271 N.E.2d 475, 479, where Judge Sullivan opined:

Our theory of democracy provides that some men shall be elected to represent others in the decision-making process of government. The underlying premise is that those represented, whether they generally favor or disfavor the philosophy or person of the representatives, shall abide by the decisions of the representatives and their agents and appointees, no matter how distasteful or shortsighted those decisions may be deemed at the time rendered. The discretion of the official rendering the decision remains nearly inviolable unless there is manifest or obvious abuse of discretion or the decision is illegal.

Municipal taxpayers are people and not homogeneous in thought or philosophy and do not, if ever, find agreement with all decisions of their elected officials regarding their city, types of services and facilities to be provided, or the proper functions and limitations of government. They may feel wronged by such decisions, especially those involving appropriations of tax money, and, as a result, demand legal remedy. While the law stands ready to right legitimate wrongs suffered by taxpayers through such devices as mandate and prohibition or declaratory or injunctive relief, it must demand that public lawsuits involve a substantial interest or right of the public.

One way in which taxpayers may obtain standing to challenge the action of public officials is to challenge the legality of an action or allege a substantial wastage of public funds. Montagano v. City of Elkhart (1971), Ind. App., 271 N.E.2d. 475. A school

corporation is given the specific ability to construct school buildings, Ind. Code § 20-5-2-2, and the Department is given the legal ability to approve building project applications, Ind. Code § 20-1-1.1-5 and 511 IAC 2-2-1. Thus nothing done by either the School or the Department is "illegal" as that term is used, nor is the Indiana State Board of Education the proper forum to determine that issue.

Petitioners may argue that the building project involves a substantial wastage of public funds. However, as noted above, the decision of the Department that the School has complied with the provisions of 511 IAC 2-2-1 does not involve any funds whatsoever. As noted above, when and if funds are expended, Petitioners may seek redress in the proper forum. Any legal determination that a project is a substantial wastage of funds as that term is used by the courts, is outside the purview of the State Board's jurisdiction.

The hearing officer directed the parties to brief the issue of Ind. Code § 20-4-1-34. In its entirety, this statute states:

(a) The state board of education shall enforce the rules compiled under IC 20-1-1-6, which establish procedures and standards for the construction of, addition to, or remodeling of school facilities. The commission shall apply these rules equally to facilities to be used or leased by both community school corporations and school corporations which are not community school corporations.

(b) No school building or addition to a school building may be constructed and no lease of a school building for a term of more than one (1) year may be entered into by a school corporation other than a community school corporation or by two (2) or more school corporations jointly without the approval of the state board of education. For the purposes of this subsection, "community school corporation" shall not include a community school corporation governed by an interim board of school trustees.

(c) No action to question any approval referred to in this section or to enjoin school construction or the performance of any of the terms and conditions of a lease or the execution, sale, or delivery of bonds, on the ground that any such approval should not have been granted shall be instituted at any time later than fifteen (15) days after such approval has been granted.

Subsection (c) may imply that any decision made by the Department can be appealed to the Board. This would give Petitioners statutory authority for standing. However, subsection (c) refers specifically to any "approval referred to in this section." The approval of preliminary plans by the Department is not referred to in the section. In fact, the only approval referred to is in subsection (b) which refers to the approval by the State Board of Education of actual building or leasing of a school building from which a community school corporation such as Clay

Community Schools is exempt. Therefore, by its very terms, Ind. Code § 20-4-1-34 is inapplicable to this case.

Throughout their briefs and memoranda, Petitioners expend a great deal of energy questioning the wisdom of the course of action chosen by the Board of Trustees of the School. While the decision to build a new school is almost always debatable, the mere fact that disagreement lies in the community does not grant those who disagree with the ultimate decision reached by their elected representatives standing to challenge the decision in any forum of their choosing. As noted above, specific remonstrances may be filed with the appropriate bodies pursuant to Ind. Code §§ 21-5-11-7 and 21-5-12-7 for lease agreements and bond issuance. A public lawsuit may be initiated in the appropriate circuit court pursuant to Ind. Code § 34-4-17-1, *et seq.*, to challenge the "validity, location, wisdom, feasibility, extent or character of construction, financing or leasing of any public improvement." Ind. Code § 34-4-17-1(b). In fact, taxpayers are statutorily granted standing in a public lawsuit. Ind. Code § 34-4-17-3. While these provisions give taxpayers a specific remedy to challenge certain actions of a school corporation, they are completely separate from the issue of whether any individual taxpayer has suffered a specific injury different from that of the community as a whole. It is the latter that Petitioners must establish in order to have standing to prosecute this appeal of a decision of the Department of Education directed to the separate legal entity known as the Clay Community School Corporation. As Petitioners have not, and cannot, demonstrate any direct and differential injury to themselves, they lack standing to present this case; therefore, the Indiana State Board of Education lacks jurisdiction of the particular case necessary to hear this cause. For these reasons, the Respondents' motions to dismiss based on standing are granted.

III. Orders

1. The Indiana State Board of Education is without jurisdiction to hear this case as petitioners lack standing to prosecute this appeal.

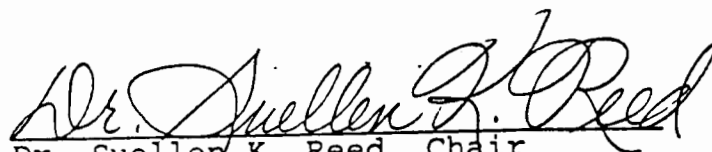
Dated: August 15, 1994

John T. Roy, Hearing Officer for
the State Board of Education

IV. ACTION BY THE STATE BOARD OF EDUCATION

On September 8, 1994, the Indiana State Board of Education unanimously voted to uphold the decision of the Administrative Law Judge dismissed the case for lack of jurisdiction.

Dated: 9-12-94


Dr. Suellen K. Reed, Chair
Indiana State Board of Education

APPEAL PROCEDURE

Any party wishing to file objections to this Order must do so in writing within fifteen (15) days of the date of this Order. The basis of any objection must be stated with particularity and must be mailed to Mr. Jeff Zaring, Board Relations Specialist, Indiana Department of Education, 229 State House, Indianapolis, Indiana 46204-2798.

This Order will become final after fifteen (15) days with no further action required by the State Board of Education unless written objections are received, or the State Board, by majority vote, decides to set this cause for oral argument. In either of these situations, the parties will be notified of the date on which the Board will consider the case.



Indiana State Board of Education

IN THE MATTER OF:)
C.G. by E.G. and D.G., parents,)
Petitioners,)
and) **Cause No. 9410025**
Blue River Valley Schools,)
Respondent.)

FINDINGS OF FACT, CONCLUSIONS OF LAW, AND ORDER

PROCEDURAL HISTORY

On October 19, 1994, the Indiana State Board of Education received a request for a hearing from Petitioners regarding the denial of their request for transfer tuition from the Blue River Valley School Corporation, the Respondent in this action, to the New Castle Area Vocational School. The Indiana State Board of Education appointed an administrative law judge. A pre-hearing teleconference was held on November 7, 1994, to narrow the issues. A hearing was held on November 10, 1994, at the offices of the Blue River Valley School Corporation. Mr. G. and C.G. were present at the hearing. Present for Blue River Valley School Corporation were Gerald Shelton, Superintendent, Steve Walsh, Principal of Blue River Valley High School, and Connie Crabtree, Guidance Counselor. The school corporation was represented by Mr. Gregory Crider of the law firm of Scotten and Hinshaw.

Attached to the Petition for Review were four documents. At the hearing, these documents were admitted as evidence without objection as follows:

- Pet. Exh. 1: Document initialed by G.S. (Gerald Shelton) concerning request to attend New Castle Area Vocational School by C.G.
- Pet. Exh. 2: Letter from Petitioners to Mr. Shelton and members of the Board of Trustee for the Blue River Valley School Corporation dated August 25, 1994.
- Pet. Exh. 3: Minutes from Sept. 12, 1994, Board meeting of Blue River Valley School Corporation.
- Pet. Exh. 4: Exerpt from Blue River Valley High School course handbook describing courses available at the New Castle Area Vocational School.

During the hearing, Respondent tendered several exhibits that were received and admitted as evidence. The exhibits were:

- Res. Exh. A: New Student Enrollment Form.
- Res. Exh. B: Student Demographic Information Form.
- Res. Exh. C: New Castle Area Vocational School Application Form.

Attachment

- Res. Exh. D: New Castle Area Vocational School Profile Summary.
Res. Exh. E: New Castle Area Vocational School Information Sheet.
Res. Exh. F: Grade Transcript for C.G.
Res. Exh. G: Minutes from October 10, 1994, Board meeting of Blue River Valley School Corporation.
Res. Exh. H: Letter from Beverly Hankenhoff, Area Vocational Director for the New Castle Area Vocational School to Mr. Gerald Shelton dated September 6, 1994.

At the hearing, the administrative law judge requested that the Respondent provide him with a copy of the agreement entered into by the Blue River Valley School Corporation and the New Castle Area Vocational School. Respondent complied with this request on November 17, 1994, by mailing a copy of the document to the administrative law judge and Petitioners. This agreement, entitled District 27 New Castle Area Vocational School Multi-LEA Operated Area Vocational Program Operating Agreement, has been marked and admitted as evidence as Res. Exh. I.

Based on the documentary evidence produced and the testimony heard at the hearing, the following Findings of Fact and Conclusions of Law are entered.

FINDINGS OF FACT

1. At all times pertinent to this action, C.G. was over the age of sixteen. C.G. is a home schooled individual whose legal settlement is within the attendance district of the Blue River Valley School Corporation.
2. C.G. had been a student at Blue River Valley High School. C.G. withdrew from Blue River Valley on March 19, 1993, during the second semester of C.G.'s sophomore year.
3. In December of 1993, Mrs. G. met with Connie Crabtree, Guidance Counselor at Blue River Valley High School to enroll another child at Blue River Valley. Mrs. G. requested information concerning the vocational school for C.G. Mrs. G. received information on how to apply through Blue River Valley to the vocational school.
4. Applications for the vocational school were available in January of 1994. Ms. Crabtree and Steve Walsh, Principal of Blue River Valley High School, interviewed applicants on February 16 and 24, 1994. Recommendations were sent to New Castle Area Vocational School on March 4, 1994.
5. Classes began at Blue River Valley and New Castle Area Vocational School on August 17, 1994.
6. C.G. did not apply for acceptance at the New Castle Area Vocational School through Blue River Valley. Rather, in August of 1994, C.G. enrolled directly at New Castle. Blue River Valley did not know of C.G.'s enrollment at New Castle until later in August of 1994, when Petitioners sought to have Blue River Valley pay for the tuition.
7. New Castle Area Vocational School is a school operating under the provisions for joint programs under Ind. Code § 20-5-11. The participating school corporations are the Blue River Valley School Corporation, Nettle Creek School Corporation, Charles A. Beard School Corporation, New Castle Community School Corporation, Shenandoah School Corporation,

South Henry School Corporation and Union School Corporation.¹

8. Prior to the September 12, 1994, Blue River Valley Board meeting, Petitioners addressed a letter to the school corporation requesting that the school corporation pay the tuition for C.G. to attend the New Castle Area Vocational School. Pet. Exh. 2. This letter also stated, "It is [C.G.'s] desire to attend B.R.V. for the Welding class and the Graphics Arts 02 class which would compliment his Building Trades program that he is taking at New Castle Vo-Tech. [C.G.] has also expressed an interest B.R.V's [sic] Agricultural Mechanics course." Beyond this however, no action was taken by Petitioners to enroll C.G. at Blue River Valley to take these courses. At the time this letter was written, August 25, 1994, classes had already begun at Blue River Valley High School.

9. The Blue River Valley School Corporation offers students enrolled in its high school the opportunity to participate in the courses offered at the New Castle Area Vocational School.

CONCLUSIONS OF LAW

1. Pursuant to Ind. Code § 20-8.1-6.1-10, the State Board of Education has jurisdiction over this matter. Any Finding of Fact deemed to be a Conclusion of Law is hereby denominated as such and any Conclusion of Law deemed to be a Finding of Fact is hereby denominated as such.

2. C.G. is not enrolled in the Blue River Valley School Corporation nor has C.G. attempted to formally enroll in Blue River Valley. Therefore, C.G. is not a "student" as that term is defined by Ind. Code § 20-8.1-1-3.5.

3. New Castle Area Vocational School is a joint program operating under the provision of Ind. Code § 20-5-11. As such, New Castle Area Vocational School is not a "school corporation" as that term is defined by Ind. Code § 20-8.1-1-1.

4. The terms of the transfer tuition statute, particularly Ind. Code §§ 20-8.1-6.1-2 and 3, do not apply in this case as the transfer tuition statute only applies to "student" transfers from one "school corporation" to another.

5. C.G.'s legal settlement is within the attendance district of Blue River Valley School Corporation. C.G. has not graduated from high school. C.G. is therefore entitled to enroll at Blue River Valley High School and take whatever classes or programs C.G. is eligible for. Blue River Valley School Corporation has the right to determine which classes or programs C.G. is eligible to participate in based on the appropriate constitutional, statutory and school policy provisions.

6. The courses at New Castle Vocational School are "available" to students at Blue River Valley High School within the meaning of 511 IAC 1-6-3(1)(A).

¹The Eder Vocational Center of the Indiana Soldiers' & Sailors' Children's Home also participates in the joint venture.

DISCUSSION

Indiana Code § 20-8.1-1-3.5 defines a student as any person enrolled in a public school corporation. It is undisputed that C.G. is not enrolled at this time Blue River Valley. What is in dispute is whether C.G. attempted to enroll at Blue River Valley, and, if so, was C.G. denied enrollment. The evidence is split on this issue. Petitioners sent a letter to Blue River Valley expressing their desire to have C.G. attend several classes at Blue River Valley. Pet. Exh. 2. No further action was taken on the matter by either party, however. The question then becomes whether this letter is enough to enroll a student.

There is no dispute that C.G. has legal settlement within the Blue River Valley School Corporation. C.G. is therefore entitled to enroll, tuition free, in Blue River Valley. The mere mentioning of a desire to enroll is not enrollment, however. Enrollment requires an affirmative step to have a student sign-up for class. Petitioners were aware of this requirement having enrolled another child in January of 1994. Petitioners were also told how to apply through Blue River Valley to get into the area vocational school. Petitioners chose not to do this but rather enroll C.G. directly in the vocational school and by-pass the application process at Blue River Valley. It does not appear that Blue River Valley in any way refused to let C.G. enroll in Blue River Valley prior to C.G. enrolling at the vocational institute. For these reasons, C.G. is not a "student" as that term is defined by Ind. Code § 20-8.1-1-3.5.

It is true that Ind. Code § 20-8.1-1-7.2 provides that a "student" is considered "attending school" when the "student" attends a vocational education school in which the school corporation of the student's legal settlement provides cooperatively a portion of the cost. . . . However, this provision does not grant C.G. the status of "student" by unilaterally enrolling in the vocational school that Blue River Valley provides cooperatively a portion of the costs. Indiana Code § 20-8.1-1-7.2 specifically refers to a "student" not an individual or person as used in other relevant statutes, i.e. Ind. Code § 20-8.1-3-17. A person must first enroll in the school corporation to become a "student" in order for this provision to apply.

This finding does not, however, as Respondent argues, mean that State Board of Education is without jurisdiction to hear this case. The State Board of Education has jurisdiction to hear all disputes concerning transfers and the right to attend school in any school corporation. Ind. Code § 20-8.1-6.1-10. This case clearly involves these elements. The fact that it is ultimately decided that Blue River Valley is not liable for tuition because, among other things, C.G. is not a "student," does not rob the Board of jurisdiction. This simply means that Blue River Valley is not responsible for tuition under the provisions of Ind. Code § 20-8.1-6.1-2.

A second reason why Blue River Valley is not responsible for transfer tuition under Ind. Code § 20-8.1-6.1-2 is that the vocational institute is not a separate school corporation. Indiana Code § 20-8.1-6.1-2 provides for transfers between two separate school corporations. A school corporation is defined by Ind. Code § 20-8.1-1-1 as any public school corporation established by and under the laws of the state of Indiana. The New Castle Area Vocation School is a joint program entered into by several school corporations pursuant to Ind. Code § 20-5-11. As such, it is not a "school corporation" as that term is used in the transfer tuition provisions.

Respondent spent a great deal of time at the hearing attempting to show that its application process was its way of complying with Ind. Code § 20-8.1-6.1-2 in determining whether a student may be "better accommodated" in the transferee school corporation. Blue

River Valley, it is argued, should not be held responsible for the transfer tuition when it was not given the opportunity to make a determination as to whether C.G. would be "better accommodated" at the vocational school. Connie Crabtree, Guidance Counselor at the school, testified at length about the application process and how every attempt was made to comply with the provisions of Ind. Code § 20-8.1-6.1-2 in determining whether a student could be "better accommodated." The school must have forgotten about the statutory duty placed upon the school by subsection C of that statute to assist people in perfecting an appeal to the State Board of Education in the case of a denial. Lucky for the school corporation that this statute is inapplicable in this case.

Under the provisions of 511 IAC 1-6-3(1)(A), in order to successfully bear their burden of proof, Petitioners must show: (1) that C.G. has established an academic or vocational aspiration; (2) that the transferee corporation has a curriculum offering that is important and necessary to that aspiration; and (3) that a substantially similar curriculum offering is unavailable at Blue River Valley. In this case, the curriculum offering is offered to students enrolled at Blue River Valley. Those students that meet the criteria are eligible to take the courses. Thus the curriculum is "available" to students at Blue River Valley.

The final issue to be resolved is the application of Ind. Code § 20-8.1-3-17.3(b). This statute specifically reads:

This section may not be construed to prohibit a student who attends a school described in subsection (a) from enrolling in a particular educational initiative offered by an accredited public or nonpublic or state board approved nonpublic school if:

- (1) the governing body or superintendent of the school corporation, in the case of the accredited public school; or
- (2) the administrative authority, in the case of the accredited or state board approved nonpublic school;

approves the enrollment or participation by the student.

Respondent argues that because it has the discretion to approve the enrollment of C.G. in the vocational school, it is not required to give any reason if it chooses not to approve the enrollment. Reading this statute in isolation, this argument has its appeal. However, taken in context with other provisions regarding the responsibilities of schools and the State Board of Education, one sees that this is not the case. As noted above, the State Board of Education has jurisdiction over all disputes regarding the right to attend school. Ind. Code § 20-8.1-6.1-10(a)(3)(C). The Indiana State Constitution in Article 8 guarantees a "general and uniform system of Common Schools, wherein tuition shall be without charge, and equally open to all." This guarantee is supplemented by Ind. Code § 20-8.1-2-1 which provides:

It is the policy of the state of Indiana:

- (a) To provide, furnish and make available equal, non-segregated, non-discriminatory educational opportunities and facilities for all regardless of race, creed, national origin,

color or sex;

(b) To provide and furnish public schools and common schools equally open to all and prohibited and denied to none because of race, creed, color or national origin;

(c) To reaffirm the principles of our bill of rights, civil rights and our Constitution;

(d) To provide for the state of Indiana and its citizens a uniform democratic system of public and common school education; . . .

Thus a school corporation does not have unfettered discretion on who and who does not receive the benefits of a public education. The discretion employed by a school corporation must not run afoul of these provisions.

There is no evidence, at this stage, that Blue River Valley has done this, however. In fact, Petitioners never gave Blue River Valley the opportunity to make this decision. What Petitioners have done is make an end run around Blue River Valley's procedures for determining who is recommended for the vocational school. The vocational school, an agent for Blue River Valley, attempts to apply Ind. Code § 20-8.1-6.1-3, the cash transfer provision. Res. Exh. H. This attempt also fails because this is not a transfer tuition question. Article IV of the Operating Agreement, Respondent's Exh. I, provides that "adult classes will be available to anyone on a first come basis with preference given to adults 16 years and older, who are not full time students." (Emphasis added). This provides the vehicle for C.G. to take courses at the vocational school without prior consent of Blue River Valley. This also means Blue River Valley is not responsible for C.G.'s tuition under the facts of this case.

ORDERS

1. If Petitioners so choose, C.G. shall be enrolled at Blue River Valley High School. C.G. shall be given the same opportunity to participate in the classes/programs of Petitioners' choosing as other students. Blue River Valley shall employ its nondiscriminatory criteria in determining what classes/programs C.G. is eligible for when and if C.G. is enrolled.

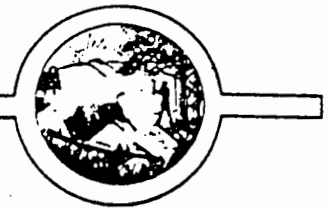
2. The Blue River Valley School Corporation is not responsible for the fall semester tuition for C.G. to attend the New Castle Area Vocational School.

/s/ John T. Roy, Esq.
Administrative Law Judge
Indiana State Board of Education

INDIANA STATE BOARD OF EDUCATION ACTION

The Indiana State Board of Education, at its February 2, 1995, meeting, adopted the decision of the Administrative Law Judge by unanimous vote.

Indiana Department of Education



Dr. Suellen Reed, Superintendent
Room 229, State House • Indianapolis, IN 46204-2798 • 317/232-6665

Before the Indiana Board of Special Education Appeals

Hearing No. 750-93

Student:

Student's Parent:

School Corporation

School's Representative:

Special Education Entity:

Randolph Central School

Margaret Bannon Miller

Jay-Randolph Special Education

Appeal Date:

September 15, 1994

Independent Hearing Officer:

Cynthia Stanley, Esq.

Attachment

C

BEFORE THE INDIANA
BOARD OF SPECIAL EDUCATION APPEALS

ARTICLE 7 HEARING NO. 750-94

Procedural History

On April 28, 1994, the School Corporation (hereafter, "the School") requested a due process hearing under 511 IAC 7-15-5 in order to implement an appropriate program for a seventeen-year-old student with a serious emotional handicap (hereafter, "the Student"). On April 29, 1994, Cynthia Stanley, Esq., of Indianapolis was appointed as the Independent Hearing Officer (IHO). On May 4, 1994, the Parent of the Student requested a due process hearing on behalf of the Student to address, generally, the Student's placement, his grade point average (GPA), the number of credits the Student has earned, the status of incompletes received in biology and history, modifications of assignments, strategies for completing homework, the appropriateness of the Student's individualized transition plan (ITP), the student's participation in graduation ceremonies scheduled for June 3, 1994, and involvement of the Student's teachers in all staffings regarding the Student. The Parent also alleged that the School discriminated against the Student. The IHO assumed

jurisdiction over the second hearing request and combined the issues.

On May 10, 1994, the IHO conducted by telephone a prehearing conference. The Parent and Student were represented by legal counsel in this prehearing. On May 27, 1994, the IHO was informed that the Parent had retained other legal counsel. A hearing date was set for June 1, 1994. However, the Parent's attorney requested a continuance from the hearing date on all issues except the Student's eligibility to participate in the graduation ceremony. The IHO granted the continuance. A hearing was held on June 1, 1994. The Parent and the Student were represented at the hearing by legal counsel. The IHO rendered her written interim opinion on June 2, 1994, finding that the Student is not eligible to participate in the graduation ceremony.

The Written Interim Decision of the IHO

The IHO, in her written interim opinion on the graduation ceremony issue alone, found that the School had recognized prior to the beginning of the 1993-94 school year that the Student was not earning sufficient credits toward a high school diploma so that he would graduate with his class. The IHO noted repeated disruptions in the School's attempts to provide educational services to the Student, including refusal of the Student to participate in homebound instruction, the Parent interfering with and dismissing the homebound instructor, the Student refusing to participate in transition programming to assist in reacclimating him to the traditional school setting, and refusal to attend the School until the School located a job for him. There were numerous case conference committee meetings during 1993 and 1994, where individualized education programs (IEPs) were developed and placements approved by the Parent. Four different jobs were located, but none worked out. The Student

was eventually employed at a drug store on January 31, 1994, where he was employed still at the time of the hearing. The part-time employment was to be in concert with homebound instruction, with instruction to be provided in the traditional school setting on Monday and Friday afternoons after school hours. However, the Student failed to attend school. The School made numerous attempts to contact the Parent during this period, but such attempts proved unavailing for the most part. Homework assignments fell off significantly, resulting in the Student falling further behind in his coursework. Although the Student increased his completion rate of homework assignments after the School requested the due process hearing on April 28, 1994, the Student had completed only 29 1/2 of the 42 credits required for graduation. The Student was deemed capable of completing the credit requirements for a high school diploma.

The School does not permit participation in graduation ceremonies of students who are capable of earning the requisite credits but have not done so.

Although the Parent asserted the Student was suicidal at not being permitted to participate in the graduation ceremony, a psychologist testifying for the Parent did not support the suicidal tendency, although the psychologist added that the Student may have been masking his feelings.

Based on these Findings of Fact, the IHO concluded that the Student was not eligible to participate in the graduation ceremony; the School has acted in good faith in its attempts to educate the Student and ensure his timely graduation; the School's graduation ceremony policy had been consistently applied; and the Student, as one capable of earning credits and receiving a diploma, is not entitled to attend graduation ceremonies as a student who has completed a program of study; as this concept is employed at 511 IAC

The IHO found in the School's favor with respect to participation of the Student in the graduation ceremony, and ordered the parties to report to her any progress they may make with respect to resolving the remaining issues. The IHO established July 13, 1994, as the date by which she must issue a final written decision on the remaining issues.

Board Refuses Interlocutory Appeal

On July 1, 1994, the Parent, apparently without participation by her legal counsel, attempted to seek review from the Indiana Board of Special Education Appeals of the interim decision of the IHO with respect to the Student's participation in graduation ceremonies.

On July 5, 1994, the Indiana Board of Special Education Appeals, by written order, denied the Parent's interlocutory appeal, noting that the decision of the IHO was not a final (and, hence, reviewable) decision; the graduation ceremony had already occurred, rendering the issue moot; the IHO had informed the parties in her written interim order that only the final order or final disposition could be appealed; and the IHO still had jurisdiction over the remaining issues. Further, the Board noted that Indiana administrative law does not provide for interlocutory appeals, and federal law militates against such appeals, particularly as the Individuals with Disabilities Education Act (IDEA) does not provide for a remand procedure. See Dellmuth v. Muth, 109 S.Ct. 2397 (1989). Additionally, the Board advised that this premature appeal does not affect or waive any future rights of a party, including the right to raise the same issues once the IHO had relinquished her jurisdiction.

Resolution, Petition for Review, and Response

The School advised the IHO on June 28, 1994, and the Parent through legal counsel advised the IHO on July 12, 1994, that resolution has been achieved on the remaining issues and that both parties wished to withdraw their respective requests for due process. The IHO granted the requests of the parties and dismissed the proceedings on July 13, 1994.

The Parent, without legal counsel, filed on August 12, 1994, the same Petition for Review as she filed on July 1, 1994. Because the Student has completed his coursework and received his diploma, all issues related to these issues have been resolved to the satisfaction of the parties. The Board considers these issues moot and will not review them under IDEA or Sec. 504 of the Rehabilitation Act of 1973. See Mars (PA) Area School District (OCR, 1994) 21 IDELR 188, where the Office for Civil Rights declined to investigate issues remarkably similar to those contained herein because the Student had completed her coursework for graduation and received her diploma.

The Parent does allege that the procedures employed for the June 1, 1994, due process hearing were inconsistent with Federal and State requirements. Such allegations are reviewable even though the substantive issues are moot. See 511 IAC 7-15-6(k) and 34 CFR Sec. 300.510(b)(2). The Parent alleges that (1) she was not allowed to present all her evidence; (2) not given sufficient time to rebut the testimony of adverse witnesses; (3) the IHO did not address sufficiently the issue raised in the hearing, and permitted too much irrelevant testimony, including testimony regarding the Parent's past behavior; (4) the IHO did not accord sufficient weight to the evidence and testimony favorable to the Parent, particularly with reference to the March,

1994, IEP; (5) the IHO permitted too much hearsay testimony; (6) the IHO permitted all witnesses to remain in the room where the hearing was being conducted; and (7) the hearing procedures generally denied the Parent due process.

The School responded on August 25, 1994, asking generally that the IHO's interim hearing decision not be disturbed. The School noted that the Parent was represented by legal counsel at the hearing and had the opportunity to present evidence through documents and testimony.

The Board notified the parties on August 25, 1994, that it would review the record of the proceedings without oral argument and without the presence of the parties. The Indiana Department of Education prepared three (3) copies of the complete record and forwarded same to the three members of the Board.

The Indiana Board of Special Education Appeals convened on September 15, 1994, in Bainbridge, Indiana, to review the record in Article 7 Hearing No. 750-94. All three members were present and had an opportunity to review the record in its entirety. The proceedings were recorded by cassette tape and will be reduced to a written transcript and provided to the parties as soon as practical.

After consideration of the record, the Parent's Petition for Review, and the School's response thereto, the Board now makes the following combined Findings of Fact and Conclusions of Law:

1. The Board has jurisdiction to review the decisions and procedures of Independent Hearing Officers appointed pursuant to 511 IAC 7-3 through 7-16 inclusive ("Article 7"), the rules and regulations of the Indiana State Board of Education for special education.

2. As to the issues raised regarding the placement of the Student and the provision of educational services to the Student by the School, these issues are now moot. The Student has completed his coursework and received his diploma. The Parent, through her legal counsel, agreed with this course of action and withdrew her request for a due process hearing. The IHO granted this request. The Parent challenges neither the graduation of the Student nor the Student's receipt of his diploma.

3. The Parent was represented at the hearing by legal counsel who is familiar with special education law. No objection was made at the hearing that the Parent was being denied the opportunity to present all her evidence. The Board finds that the Parent was a significant witness. Further, the Parent does not state what evidence, if any, she was prevented from presenting.

4. By the Parent's own account, the hearing lasted twelve (12) hours, seven (7) of which constituted the School's case in chief, leaving the Parent five (5) hours for her case. These are both significant time allotments for presentation of evidence on a single issue. Further, the Parent actively cross-examined the School's witnesses, did not object to the IHO's procedures, and has not stated how she was prevented from rebutting the testimony of adverse witnesses.

5. The issue at the June 1, 1994, hearing was, at the Parent's request, narrowed to the question of whether the Student was eligible to participate in the graduation ceremony scheduled for June 3, 1994. The Student's academic history was relevant to this consideration, as was the Parent's behavior in preventing the School from providing educational services to the Student. The Parent's behavior was a substantial reason the Student was not eligible to receive a diploma and participate in the graduation ceremony.

6. The IHO did not abuse her discretionary authority in the weighing of the evidence, nor did she act in an arbitrary or capricious manner. The March, 1994, IEP could not be fully implemented.

7. A certain amount of hearsay testimony will occur in administrative hearings such as these. It is the IHO's responsibility to determine to what extent such testimony will be permitted and to accord it the weight she deems appropriate in the circumstance. There is no evidence that the IHO in any way abused this discretion, particularly as there is documentation and other testimony which substantiated hearsay remarks.

8. A party has the right to request that witnesses be separated and be advised not to discuss their testimony with anyone until they have completed their testimony. No party made such a request, including the Parent. The Parent did not object during the proceedings in this regard.

9. The Board finds that the procedures employed by the IHO were fair to all parties involved. Both parties were represented by legal counsel. The School's anecdotal records were extremely thorough and precise, and were very persuasive with respect to the Student's lack of eligibility to receive a

diploma when he was deemed capable of doing so. The evidence and testimony support the IHO's conclusions that the School acted in good faith. The Parent has failed to demonstrate what additional evidence she was prevented from presenting or what newly discovered evidence might alter the IHO's decision. It is the responsibility of the party alleging additional evidence to present same. It is not the responsibility of the Board to seek such evidence.

Orders

1. The issues relative to eligibility for a diploma and to attend the graduation ceremony having been resolved are now moot, and the Board will not consider these issues.
2. The procedures employed by the Independent Hearing Officer provided the Parent and Student with due process as contemplated by IDEA and Article 7.
3. Any other Motions before the Board not specifically addressed above are deemed overruled.

The Board was unanimous in these regards.

September 15, 1994

William F. Hendrickson, Chair

Indiana Board of Special Education Appeals

Indiana Professional Standards Board

"Setting standards for the preparation and licensing of educators"



251 East Ohio Street, Suite 201 - Indianapolis, IN 46204-2133
Telephone: 317/232-9010 • FAX: 317/232-9023

Before the Indiana Professional Standards Board

Cause No. 940419067

DECISION

In the Matter of)	Before Kevin C. McDowell
C. R. C.)	and J. David Young,
)	Administrative Law Judges
Fitness Hearing Under)	
515 IAC 1-2-18(g))	

Procedural Background

Petitioner seeks a declaration of fitness in order to hold an Indiana initial standard license. Petitioner's request was received by the undersigned on April 7, 1994, although it appears that the Office of Teacher Certification had advised Petitioner on December 20, 1993, that a fitness hearing would be arranged. A hearing was conducted on May 19, 1994, in Room 225, State Capitol Building, in the offices of the Indiana Department of Education. Petitioner was represented by John P. Jackson, Esq., while the Office of Teacher Certification was represented by John T. Roy, Esq. The hearing was conducted in accordance with I.C. 4-21.5-3 and I.C. 20-1-1.4-10.

Petitioner submitted without objection the following ten documents, which were admitted into the record.

- P-1: Letter of Recommendation from Dr. Kenneth R. Richmond, Oakland City College (5/16/94).
- P-2: Altered Academic Record of Petitioner purportedly from Indiana University Southeast.
- P-3: Forged Indiana Teacher License bearing Petitioner's name and social security number.

Attachment

D

- P-4: Letter of Recommendation from Mr. Jerry Reinhardt, Administrative Assistant, Lanesville Community School Corporation (5/18/94).
- P-5: Petitioner's official transcript from Oakland City College as of 8/4/93.
- P-6: Letter of Recommendation from Mr. Jack Wilkinson, biology teacher and supervising teacher of Petitioner while student teaching at Wood Memorial High School (5/4/93).
- P-7: Letter of Recommendation from Mrs. Janet Gentry, chemistry teacher and supervising teacher of Petitioner while student teaching at Wood Memorial High School (5/4/93).
- P-8: College Supervisor Evaluation of Student Teaching Performance regarding Petitioner as compiled by Ms. Etta Lou Sellars for Spring Semester, 1993.
- P-9: Petitioner's resume.
- P-10: Mid-Term Student Teacher Evaluation of Petitioner by Mrs. Janet Gentry (4/5/93).

Findings of Fact

From the testimony and evidence produced at the hearing, the following Findings of Fact are determined:

1. Petitioner was attending Indiana University Southeast when he became aware of the availability of a teaching and coaching position in the Lanesville Community School Corporation for the 1990-91 school year.
2. Petitioner falsified his academic transcript (Ex. P-2) and falsified his wife's valid Indiana teacher's license to indicate he possessed a valid license. (Ex. P-3).
3. Petitioner commenced his duties as a junior high school science teacher and basketball coach for Lanesville Community School Corporation. The school corporation never requested an official transcript.
4. Petitioner was confronted by school officials shortly after the holiday break around January, 1991, regarding his transcript and teaching credentials. He promptly resigned.
5. Although Petitioner was never formally charged with criminal activity, he did agree to reimburse the school the salary he had received.
6. Petitioner was suspended from the Indiana University system.

7. Petitioner, at urging of Mr. Reinhardt (see Ex. P-4), enrolled at Oakland City College where he completed his academic requirements including student teaching in May, 1993 (Ex. P-5).
8. Petitioner has the ability to establish rapport with students (Exs. P-4, P-6, P-7, P-8 and P-10) and has displayed the rudimentary qualifications necessary to be an effective teacher.
9. Testimony elicited from Petitioner on cross examination and by examination by the Administrative Law Judges revealed that Petitioner's supervising teachers were unaware of Petitioner's past activities (Findings of Fact Nos. 1-6 inclusive); likewise, the teacher credential official at Oakland City College was not aware of these activities.
10. Petitioner was not aware he jeopardized his wife's teaching license when he forged his own. Petitioner did not express any remorse in the respect during his direct examination.

Discussion

The Indiana Professional Standards Board, in determining fitness, shall consider the following factors:

1. The likelihood the conduct or offense adversely affected, or would affect, students or fellow teachers and the degree of adversity anticipated.
2. The proximity or remoteness in time of the conduct or offense.
3. The type of teaching credential held or sought by the individual.
4. Extenuating or aggravating circumstances surrounding the conduct or offense.
5. The likelihood of recurrence of the conduct or offense.
6. The extent to which a decision not to issue the license would have a chilling effect on the individual's constitutional rights or the rights of other teachers.
7. Evidence of rehabilitation, such as participation in counseling, self-help support groups, community service, gainful employment subsequent to the conduct or offense, and family and community support. See 515 IAC 1-2-18(h).

These seven factors are included within three general areas of inquiry when attempting to decide whether one displays the requisite fitness to be a teacher in the State of Indiana: (1) academic qualifications, (2) character, and (3) reputation.

A license is by its very nature a privilege that is granted one and is not an

entitlement merely because one possesses the academic qualifications. See I.C. 20-6.1-1-4(a). No one has the right to work for the State in the school system on his own terms, but may only do so upon reasonable terms laid down by the proper authorities of the State of Indiana. Past conduct may well relate to present fitness, and is thus a proper area of inquiry. "A teacher works in a sensitive area in a schoolroom. There he shapes the attitude of young minds towards the society in which they live. In this, the state has a vital concern. It must preserve the integrity of the schools. That the school authorities have the right and the duty to screen the officials, teachers, and employees as to their fitness to maintain the integrity of the schools as a part of ordered society cannot be doubted." Adler v. Board of Education of City of New York, 72 S.Ct. 380, 385; 342 U.S. 485, 493 (1952). In Indiana, the Professional Standards Board establishes such standards. See I.C. 20-1-1.4-7.

The first test--academic qualifications--is the easiest to ascertain. Petitioner has satisfied the academic qualification standard. But attainment of one standard does not automatically satisfy fitness requirements where, as here, the Petitioner's character and reputation have been implicated for closer scrutiny by his past activities.

"There is a distinction in meaning between character and reputation. A person's character depends upon the attributes which he in reality possesses, while his reputation depends upon the attributes which the people generally in the community believe him to possess." Bills v. State, 119 N.E. 465 (Ind. 1918); Wolf v. State, 166 N.E. 883, 885 (Ind. App. 1929); Bay v. Oregon State Board of Education, 378 P.2d 558, 561-2 (Ore. 1963).

"The proper education of the youth of this country by precept and example is one of the most delicate and important functions of the state, and it is not an arbitrary exercise of power to require that those persons intrusted with such education should themselves possess a good moral character." Odell v. Flaningam, 179 N.E. 823, 826 (Ill. 1932); Watson v. State Board of Education, 22 C.A.3d 559, 565 (Cal. App. 1971). See particularly I.C. 20-10.1-4-4, which requires each public and nonpublic school teacher to present his instruction "with special emphasis on honesty, morality, courtesy, obedience to law,...the dignity and necessity of honest labor and other lessons of a steady influence, which tend to promote and develop an upright and desirable citizenry...."

In the instant matter, the Petitioner has not demonstrated his character is yet consistent with the privilege of being a teacher. While the deception and dishonesty surrounding the Lanesville Community School Corporation matter are serious incidents raising questions regarding Petitioner's character, his subsequent omissions have not allayed concern. He has expressed no remorse except when he is challenged. Those who would have been in the better position to assess his character--Oakland City College officials and his supervising teachers--were kept ignorant of the circumstances involving the Lanesville Community School Corporation.

This lack of forthrightness in his character has tainted his reputation as well. While his reputation in Lanesville is, understandably, not good (Ex. P-4), it cannot be said that his reputation is any better in the Oakland City College community or at Wood

Memorial High School, notwithstanding the letters of recommendation. Critical people called upon to assess Petitioner's teaching skills were never advised of the Lanesville incident. This severely limits their evaluations of Petitioner; as a consequence, questions concerning his reputation remain unanswered.

Petitioner need not tell the world of his past indiscretions, but he cannot deny the existence of same by omission to those charged with evaluating him as a potential teacher.

Conclusions of Law

1. The Indiana Professional Standards Board has jurisdiction to determine Petitioner's fitness to hold an Indiana teacher's license.
2. Petitioner has satisfied the academic qualifications necessary to seek permission from the Professional Standard Board to issue an Indiana initial standard teacher's license.
3. Petitioner, prior to his completion of the academic qualification, altered his college transcript, forged an Indiana teacher's license, accepted a teaching/coaching job in an Indiana School corporation, and subsequently resigned the position once confronted.
4. Petitioner was dismissed from Indiana University for the occurrences described above, although Petitioner did make restitution to the school corporation.
5. Petitioner never advised those who would be evaluating him as a student teacher of the occurrences above, which have a direct relationship to his fitness as a teacher.
6. Petitioner has not yet displayed the necessary character and reputation sufficient for the Professional Standards Board to issue him teaching credentials.

Order

Petitioner's request that he be found fit to hold an Indiana initial standard teacher's license is denied.

/s/ Kevin C. McDowell
Administrative Law Judge

/s/ J. David Young
Administrative Law Judge

Indiana Professional Standards Board Action

The Indiana Professional Standards Board, at its July 21, 1994, meeting, by unanimous vote, approved of and adopted this decision.

Appeal Statement

Pursuant to IC 4-21.5-5-5, any party aggrieved by the decision of the Indiana Professional Standards Board may seek judicial review from a civil court with jurisdiction. Petition for Judicial Review must be filed within thirty (30) calendar days from receipt of this order.

Certificate of Service

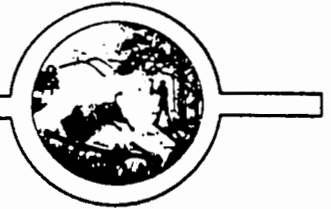
I certify that I have the 22nd day of July, 1994, served the foregoing Final Order on the parties at the addresses shown below by Certified Mail, Return Receipt Requested, or by interdepartmental mail, as indicated.

Kevin C. McDowell, Esq.
Room 229, State House
Indianapolis, IN 46204-2798
(317) 232-6676

Indiana Professional Standards Board

"Setting standards for the preparation and licensing of educators"

251 East Ohio Street, Suite 201 - Indianapolis, IN 46204-2133
Telephone: 317/232-9010 • FAX: 317/232-9023



STATE OF INDIANA)
) SS: INDIANA PROFESSIONAL STANDARDS BOARD
COUNTY OF MARION) CAUSE NO. 940510071

IN THE MATTER OF
DONALD DESALLE
INDIANA TEACHING LICENSE NO. 359956

FINDINGS OF FACT,
CONCLUSIONS OF LAW,
AND ORDER

Introduction

This matter came to hearing before Joseph Weaver and Risa Regnier, Administrative Law Judges for the Professional Standards Board, on June 22, 1994. The issue was whether Petitioner's teaching license should be revoked based on a criminal conviction. Petitioner, the State Superintendent of Public Instruction, was represented by counsel John T. Roy, Esq. Respondent, Donald DeSalle, was represented by counsel Jeffrey A. Lockwood, Esq. Witness testifying on behalf of Petitioner was Investigator Sam Hanna of the Madison County Police Department; witnesses testifying on behalf of Respondent were Respondent and Respondent's wife, Barbara DeSalle. In lieu of closing arguments, parties were given approximately 30 days to submit post-hearing briefs which included the issue of ex post facto application of 515 IAC 1-2-18.

On July 22, 1994, Mrs. Barbara DeSalle telephoned ALJ Regnier and engaged in an ex parte communication. Mrs. DeSalle did not directly discuss her husband's case but did reiterate testimony given at the hearing concerning alleged misconduct by public and school officials in Madison County which she believes to have some relationship to her husband's case. The parties were given the required statutory notice of the content of the conversation by ALJ Regnier in a memorandum entitled Notice of Ex Parte Communications, which was entered into the record of proceedings on July 25, 1994.

Findings of Fact

1. The State Board of Education has both personal and subject matter jurisdiction in this cause pursuant to IC 20-1-1.4-2, IC 20-1-1.4-7 and IC 20-6.1-3-7.
2. Respondent Donald DeSalle is the holder of Indiana Professional Teaching License no. 359956.
3. Respondent and his wife are engaged in business as experts on toy cars and trucks, which is well known in their community. In early 1991 while Respondent was employed as a teacher by Anderson Community Schools, he purchased two toy cars from a student during school hours. The cars belonged to the student's mother who may have given her permission for the student to sell one of the cars, but not the other.
4. Upon discovering the toy cars missing, the student's mother notified the police. The student admitted selling the cars to Respondent. The student agreed to be "wired" by the police, i.e. wear a hidden microphone, and go to Respondent's house to talk to him about what to tell his parents and the police. During the recorded

Attachment

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conversation Respondent denied any knowledge that the car(s) were stolen at the time he purchased them. Due to other personal concerns of Respondent, he urged the student not to implicate him and helped the student invent a story for his parents and the police. Respondent later lied to the police concerning when he had last seen the student.

5. During the conversation between the Respondent and the student that was recorded, Respondent used vulgar and offensive language that was inappropriate and unprofessional considering his position as a role model.
6. On April 1, 1991, Respondent was charged with one (1) count each of aiding, inducing or causing an offense; receiving stolen property; obstruction of justice; and assisting a criminal, all as Class D felonies in the Madison County Circuit Court.
7. On November 3, 1993, Respondent entered into a plea agreement whereby he pled guilty to obstruction of justice, a Class D felony. All other charges were dismissed. Pursuant to the plea agreement, the judge entered the conviction as a Class A misdemeanor. Respondent was sentenced to one (1) year in the Madison County Detention Center, suspended, and placed on probation for one (1) year. Respondent was also fined \$1500 and ordered to reassemble the cars and return them to the victim.
8. At the time of entering into the plea agreement on November 3, 1993, Respondent knew that if he was convicted of a misdemeanor he could retain his teaching license under the rule of the Professional Standards Board.
9. The written plea agreement, which was admitted into evidence, says nothing about Respondent's teaching license.
10. The amendment to the Professional Standards Board rule that permits license revocation for misdemeanors as well as felonies became effective January 15, 1994.
11. A complaint was filed with the Professional Standards Board seeking revocation of Respondent's license on May 11, 1994.

Conclusions of Law

1. Any findings of fact that can be considered conclusions of law are deemed conclusions of law. Any conclusions of law that can be considered findings of fact are deemed findings of fact. Equity is against the Petitioner and in favor of the Respondent.
2. Respondent raises in his post-hearing brief the issue of the Professional Standards Board's jurisdiction: that the breadth of 515 IAC 1-2-18 exceeds the board's statutory authority to revoke Respondent's teaching license.

This argument lacks merit. The General Assembly has granted the Professional Standards Board broad powers in matters concerning teacher training and licensing at IC 20-1-1.4-1, et. seq., which Respondent fails to address. IC 20-1-1.4-2 gives the board "sole authority and responsibility" in these areas; IC 20-1-1.4-7 addresses the board's authority to adopt rules to "suspend, revoke, or reinstate teacher licenses." The promulgation of administrative rules is governed by IC 4-22-2. Under IC 4-22-2-32 the Attorney General must review all promulgated rules prior to final approval by the Governor and filing with the Secretary of State. Under subsection (c), if the review of the Attorney General determines that the rule "has been adopted without statutory authority," the Attorney General "shall disapprove" the rule. At the time the Professional Standards Board promulgated the amendments to 515 IAC 1-2-18, the amended rule was reviewed and approved by the Attorney General.

3. Respondent raises the issue of whether the Professional Standards Board is estopped (barred) from revoking Respondent's teaching license because the Madison County Prosecutor, an agent of the state, induced

Respondent to plead guilty to a Class D felony that would receive misdemeanor treatment specifically so Respondent could retain his teaching license.

As noted in Finding of Fact 9, the written plea agreement says nothing about Respondent retaining his teaching license.

"Estoppel" means that a party is prevented by his own acts (or the acts of his agent) from claiming a right to the detriment of another party who was entitled to rely on such conduct and who acted accordingly.

As indicated in Conclusion of Law 2, IC 20-1-1.4-2 gives the Professional Standards Board "sole authority and responsibility" in teacher licensing matters. The Professional Standards Board is not a party in a criminal action involving a teacher, nor is a county prosecutor (or deputy prosecutor) a party in an administrative license revocation action. A prosecutor is an agent of the state in criminal matters. No agency relationship exists between a prosecutor and the Professional Standards Board; consequently, a prosecutor is without authority to bind or obligate the board and the board is not estopped from pursuing a revocation action by any representations that may have been made by the deputy prosecutor.

4. Respondent raises in his post-hearing brief the issue of whether the State Superintendent is barred from seeking revocation of Respondent's license based on the doctrine of laches. The doctrine of laches is based on the maxim that equity aids the vigilant. Respondent's argument is, put simply, that the State Superintendent neglected to initiate this revocation action for such an unreasonable length of time that to do so now is somehow inequitable to Respondent.

Whether the passage of time for initiating this action is calculated from November 3, 1993, or from January 15, 1994, the length of time does not constitute an unreasonable delay.

5. Respondent argues that the evidence presented by the Complainant is insufficient to carry the burden of proof.

515 IAC 1-2-18(b) states that a license may be revoked for immorality, misconduct in office, incompetency, or willful neglect of duty. Subsection (b)(3) provides that one of the grounds for revocation may be that "the person to whom the license was issued has been convicted of a misdemeanor or a felony which directly relates to the ability to perform the person's teaching duties."

The evidence shows Respondent was convicted of a misdemeanor charge of obstruction of justice. Evidence of the conduct on which that charge was based was admitted in the form of a recorded and transcribed conversation during which Respondent encouraged a student to lie to his parents and the police about Respondent's purchase of toy cars belonging to the student's mother. The purchase took place during the school day. Respondent admitted he later lied to the police about when he had last seen the student; Respondent attempted to mitigate his admission by stating that he was not under oath at the time he lied to police.

Indiana Code 20-10.1-4-4 states in pertinent part:

Each public and non-public school teacher, employed to instruct in the regular courses of the first twelve (12) grades, shall present his instruction with special emphasis on honesty, morality, courtesy, obedience to law, respect for the national flag, the constitutions of the United States and of Indiana, respect for parents and the home, the dignity of honest labor and other lessons of a steady influence, which tend to promote and develop an upright and desirable citizenry.

The evidence supports a conclusion that the conduct underlying Respondent's conviction directly relates to his ability to perform his teaching duties. Respondent's crime involves lying to police and inducing a student to lie to parents and police. That behavior not only directly relates to Respondent's credibility and effectiveness as a teacher, it reflects a lack of personal character and integrity necessary to fulfill the statutory directive above. Consequently, Complainant carried the burden of proof to support revocation of

Respondent's license.

6. The most critical issue before the board in this case, and an issue dealt with here for the first time, is whether 515 IAC 1-2-18, as amended in January 1994, shall be applied by the board to Respondent's misdemeanor conviction entered prior to that date. Because the regulation is silent on that point, it is incumbent on this board to establish herein whether the regulation can and will be applied retroactively, or whether ex post facto application is repugnant to the board's sense of equity and fundamental fairness..

Both parties briefed the issue of ex post facto application of 515 IAC 1-2-18 and cited ample cases in support of their respective positions which will not be repeated here. There is case law indicating that the prohibition against ex post facto application of a law applies generally to criminal statutes or statutes that impose additional penalties for prior conduct without due process of law. There is also case law holding that the imposition of increased standards or prohibitions for past conduct in the course of regulating a profession does not violate the ex post facto clause of the Constitution.

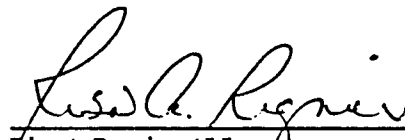
The Professional Standards Board is charged with regulating the teaching profession in Indiana. In the course of administering and applying its regulations to the profession it exercises jurisdiction in both law and equity. 515 IAC 1-2-18 is, by its own terms, intended to be remedial and not punitive. The dilemma for the board is whether it should apply its regulation retroactively just because it legally can.

Respondent testified that he pled guilty to a Class D felony with the understanding it would be treated as a misdemeanor so he could retain his teaching license. Had he known the rule was being revised to include misdemeanors and that it could apply retroactively to his conviction, his decision might have been different. For this board to take an action as serious as a license revocation based on a regulation that was not in force at the time of Respondent's conviction smacks of vengeance, which has no place in the deliberations of a body charged with administering its rules in an equitable manner. There should be no question, however, about the board's concerns about the Respondent herein. Had his conviction been entered after January 15, 1994, this board would order revocation of Respondent's license. However, ex post facto application of the amended rule offends this board's sense of equity and fairness to such an extent that it declines to so apply it.

Order

The Professional Standards Board shall not revoke the Indiana teaching license of Donald DeSalle for the reason that it declines to apply 515 IAC 1-2-18, as amended January 15, 1994, to Mr. DeSalle's conviction entered November 3, 1993.


Joseph Weaver, ALJ
Professional Standards Board Member


Kisa A. Regnier, ALJ

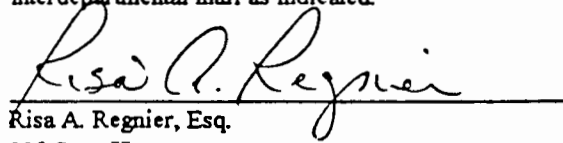
Order of the Administrative Law Judges adopted as a final order by unanimous vote of the Professional Standards Board on November 17, 1994.

Appeal Procedure

Pursuant to IC 4-21.5-5-5, any party aggrieved by the decision of the Indiana Professional Standards Board may seek judicial review from a civil court with jurisdiction. Petition for Judicial Review must be filed within thirty (30) calendar days from receipt of this order.

Certificate of Service

I certify that I have this 18th day of November, 1994, served the foregoing Findings of Fact, Conclusions of Law, and Final Order on the parties at the addresses shown below by Certified Mail, Return Receipt Requested, or by interdepartmental mail as indicated.



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